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No. 80-1016

In the Supreme Court of the United States

OCTOBER TERM, 1980

BOISE CASCADE CORPORATION,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY; SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the General Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 be applied to grant a right of way to a railroad constructed prior to its passage?

2. Is a railroad entitled to a 200-foot right of way under the Act on a line constructed in 1873 where the required filings submitted after enactment in 1875 designated a line different than the line previously constructed, indicated that the line was to be constructed in the future and have remained uncorrected for 105 years?

3. Is summary judgment appropriate where there is a genuine issue of material fact regarding the location of the right of way granted pursuant to administrative action under the Act?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Boise Cascade Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on July 24, 1980.

OPINION BELOW

The opinion of the court of appeals is reported at 630 F.2d 720. A copy of the opinion is attached

as Appendix A. The order of the United States District Court for the District of Utah granting summary judgment to respondents is reported at 454 F. Supp. 531. A copy of that order is attached as Appendix B. The district court's judgment and decree is not reported; a copy is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on July 24, 1980.[1] A timely petition for rehearing *in banc* was denied on September 23, 1980, *see* Appendices D (denying rehearing) and E (denying rehearing *in banc*) attached, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The General Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 (the Act), provides in pertinent part:

> Section 934 *Right-of-way through public lands granted to railroads*
>
> The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State

[1] On May 8, 1980, the court of appeals issued its initial opinion and judgment in this matter. Boise Cascade petitioned the court to recall the mandate in the case and for leave to file a petition for rehearing out of time to allow the court to correct errors in that opinion. On July 24, 1980, the court issued an order recalling the mandate, withdrawing the opinion filed May 8, filing a new opinion and permitting the parties the usual time from the new filing to petition for rehearing. Boise Cascade obtained an extension of that time and thereafter filed a timely petition for rehearing in banc on August 22, 1980.

or Territory . . . which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of 100 feet of each side of the central line of said road . . . .

. . . .

Section 937. *Filing profile of road; forfeiture of rights*

Any railroad company desiring to secure the benefits of sections 934-939 of this title shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such land over which such right of ways shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

. . . .

The Act of February 25, 1909, 35 Stat. 647, 43 U.S.C. § 940, provides in pertinent part:

Section 940. *Forfeiture of rights where railroad not constructed in five years after location*

Each and every grant of right of way made prior to February 25, 1909, to any railroad corporation under section 934-939 of this title where such railroad had not been constructed in the period of five years next following the location of said road, or any section thereof, and on that

> date expired, is declared forfeited to the United States, to the extent of any portion of such located line then remaining unconstructed, and the United States resumes the full title to the lands covered thereby free and dischaged from such easement, and the forfeiture declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land conveyed by the United States prior to such date subject to any such grant of right of way or station grounds . . . .

A complete copy of each of the above acts and of relevant portions of the Fundamental Enabling Act of July 16, 1894, 28 Stat. 107, is attached as Appendix F.

STATEMENT OF THE CASE

This quiet title action was commenced in 1976 after a dispute developed between Boise Cascade and Union Pacific Railroad Company regarding title to a strip of land in Section 16, Township 6 South, Range 2 East, Utah Country, Utah.

In 1871 the Railroad commenced construction of its proposed 73 mile road and by November of 1873 had completed the portion at issue here.[2] (R. 238) In

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[2] The Utah Southern Railroad Company was organized in January of 1871 to construct a railroad line from Salt Lake City to Payson, Utah. The Articles of Incorporation were amended in 1877 and 1879 to extend the road 29 miles further south. Title to the road, which was completed in 1879, passed through a number of reorganizations and conveyances until 1903 when it was conveyed to its current owner, respondent San Pedro, Los Angeles & Salt Lake Railroad Company. Since 1936, Union Pacific has leased the road from its owner. For ease of reference and because there is no dispute that respondents stand in the same position as their predecessors, each and all of the railroads constructing, owning or leasing the line in question will be referred to in this petition as the Railroad.

September of 1875, following passage of the Act, the Railroad filed its articles of incorporation and a profile map with the Secretary of the Interior (Secretary). The Secretary approved the map and filed the articles on September 28, 1875.

Based upon these filings and the Secretary's approval of them, the Railroad claims a 100-foot right of way on either side of the center line of its track constructed in 1873.

Boise Cascade is the successor in interest of the grantee of a patent by the State of Utah. Utah claimed title to Section 16 as a school section conveyed to it under the Fundamental Enabling Act of July 16, 1894, 28 Stat. 107.[3]

The Railroad has not utilized its entire claimed 200-foot right of way for railroad purposes. For more than 20 years, the Railroad had maintained fences on either side of the track approximately 33 feet from its center line. (R. 46) Boise Cascade's property is bounded on the east by the fence located 33 feet west of the track. The 67-foot strip in dispute is the land located between the fence and the claimed 100-foot right of way on the west side of the track. Boise Cascade has made valuable improvements on this strip. (R. 159)

There is a dispute in the record whether the line indicated on the profile map filed by the Railroad and approved by the Secretary corresponds to the line con-

[3] Utah's title to Section 16 was confirmed in Patent No. 43-65-0183 issued by the United States on April 24, 1965.

structed in 1873. Boise Cascade introduced a certified plat prepared by a licensed surveyor establishing that the rail line shown on the profile map is approximately 430 feet east of the line built in 1873. (R. 115) The Railroad has refused to admit that the plat is accurate (R. 134) but has acknowledged that it cannot admit or deny that the line on the profile map is located more than 100 feet east of the present center line of the trackage. (R. 41)

It is not disputed that the due proofs of organization, consisting of verifications attached to the Railroad's articles of incorporation, submitted to the Secretary pursuant to the requirements of the Act indicated that the Railroad, on August 17, 1875, was "fully authorized to proceed with the construction of its road."[4]

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals warrants review by this Court.

1. THE DECISION GRANTS A WINDFALL TO THE RAILROAD CONTRARY TO THE INTENT OF THE ACT AND IN CONFLICT WITH THIS COURT'S INTERPRETATION OF THE INTENT OF THE ACT.

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[4] The copy of the articles of incorporation with verifications by the Auditor of Public Accounts for Utah Territory dated August 17, 1875 which are in the record were actually filed with the Secretary as part of "amended due proofs" in 1880 after the length of the road was extended. The last page of the verification (R. 217) is reproduced in its entirety and attached as Appendix G. Because the verifications are dated August 17, 1875, approximately one month prior to the September 28, 1875 approval of the Secretary, it is presumed that these articles and verifications were part of the Railroad's original filing.

The court of appeals has applied the Act to a railroad constructed prior to its passage contrary to congressional intent. It has further liberally construed the Act and the Secretary's actions pursuant to it contrary to the rationale of *United States v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1 (1893) and *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942) and based upon an erroneous extension of *Jamestown & Northern R. Co. v. Jones*, 177 U.S. 125 (1900).

A. *The Act was not intended to apply to a road constructed prior to its passage.*

In its opinion, the court of appeals concludes that a railroad company, by simply filing its articles of incorporation and proofs of organization with the Secretary after passage of the Act, could receive the generous benefits of the Act for any line constructed prior to its passage. That conclusion is in conflict with the purpose of the Act.

In *United States v. Denver & Rio Grande Ry. Co.*, *supra*, 150 U.S. at 8, the Court unequivocally stated that the purpose of the Act was to promote the construction of new rail lines in the West. The Court said:

> The general nature and purpose of the Act of 1875 were manifestly to promote the building of railroads through the immense public domain remaining unsettled and undeveloped at the time of its passage. . . . To induce the investment of capital in the construction of railroads through the public domain, Congress had previously granted special rights, such as were conferred upon the defendant by the Act of 1872; but, by

> this Act of 1875, a general offer was made to any and all railroad companies . . . provided such railway company should comply with the provisions of section four of the Act.

See also, Great Northern Ry. Co. v. United States, supra, 315 U.S. at 274.

That the Act was never intended to apply to railroads constructed prior to its passage is further evidenced by its legislative history and early administrative interpretation.

In 1873, Senator Clayton submitted a resolution which provided that the Committee on Railroads be instructed to consider reporting a bill which would provide a general system of railroad incorporation "whereby persons may . . . become bodies corporate . . . for the purposes of constructing . . . railroads . . . ." Resolution of December 8, 1873, 43d Cong. 1st Sess., Sen. Misc. Doc. 12 (Serial 1584). The bill reported out and passed provided for both the incorporation of railroad companies in the Territories and the grant of rights of way to them over the public lands. Cong. Rec. 43d Cong. 1st Sess. Vol. 2, pt. 3, 2896-98 and pt. 4, 3036-42 (1874). The House substituted an act that provided only for the grant of rights of way. Cong. Rec. 43d Cong. 2d Sess. Vol. 3, pt. 1, 404 (1875). A conference committee recommended the House bill with minor amendments and the report passed both houses. Cong. Rec. 43d Cong. 2d Sess. Vol. 3, pt. 3, 2070, 2210 and 2217 (1875).

The congressional debates on the bills make it plain that its purpose was to encourage new construction.[5] Given the foregoing, the conclusion is inescapable that Congress did not intend the Act to bestow broad rights of way for rail lines already constructed at the time of its passage. This would in no way serve the purpose of encouraging new construction.

The contemporaneous administrative interpretation of the Act also is pertinent. *Great Northern Ry. Co., supra,* 315 U.S. at 275. In the first Circular Instructions on the Act, issued June 30, 1875, the Secretary set forth regulations on the "due proofs of organization"

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[5] For example, Senator Stewart of Nevada, the sponsor of the bill in the Senate and a member of the conference committee, stated:

> [A]nd I say God speed to the men who will build railroads there with their own money, as this bill proposes, and enrich the nation.

Cong. Rec. 43 Cong. 1st Sess. Vol. 2, pt. 4, 3037 (1874). Senator Hager of California objected to an amendment to the bill which would have allowed a territory, when admitted as a state, to revoke the railroad's franchise. He said:

> There is not a sufficient guarantee . . . to encourage the investment of money in this kind of enterprise when this limitation is attached to it . . . . For this reason I think the law would be inoperative. It would be a useless law upon our statute-books with that provision in it. No man would invest his money in a railroad enterprise when the object of the law under which he claimed to be incorporated could be changed in the manner proposed.

Id. Congressman Townsend, the sponsor of the House Bill and a member of the conference committee, in response to a proposed amendment that would have deleted the right of railroads to take material and timber from adjacent public lands, said:

> [I]f they are willing to risk their capital out in the Territories, they ought to have some little show in order to enable them to build these roads.

Cong. Rec. 43d Cong. 2d Sess. Vol. 3, pt. 1, 404 (1875).

required to be filed under Section 1 of the Act. He instructed that the filing should include:

> The official statement . . . that the company is fully authorized to proceed with the construction of the road . . . .

2 Copp's Public Land Laws 815, 816 (1882). An identical statement is contained in every subsequent set of regulations issued by the Secretary.[6] Two of these subsequent regulations expressly provided that:

> the requirements of the law regarding the filing of the proper papers and maps are conditions precedent to the obtainment of the right to construct a railroad over the public lands . . . .

2 Copp's Public Land Laws 818 (1882); *accord*, 12 Land Decisions 426 (1891).

Decisions of the Secretary in the period immediately following the Act also considered it applicable only to railroads constructed after its passage. For example, in *Perkins v. Central Pacific R.R. Co.*, 1 Land Decisions 336 (1882), the Secretary, referring generally to land and right of way grants to railroads, said:

> These grants were not in consideration of any debt or obligation on the part of the United States to the grantee. They were bounties bestowed on the railroad company by the United

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[6] Circular Instructions of March 9, 1878, 2 Copp's Public Land Laws 816, 817 (1882); Circular of January 13, 1888, 12 Land Decisions 423, 425 (1891); Regulations of November 4, 1898, 27 Land Decisions 623, 625 (1898); Regulations of February 11, 1904, 32 Land Decisions 481, 485 (1904); Regulations of May 21, 1909, 37 Land Decisions 787, 790 (1909).

> States to encourage the building of the road, and in consideration thereof the company undertook to build.

1 Land Decisions at 341. *See also, North Wisconsin Ry. Co.*, Dec. Nov. 17, 1879, 2 Copp's Public Land Laws 823 (1882).

In support of its conclusion that the Act was intended to have retroactive application, the court relied on one case, *Rio Grande Western Ry. Co. v. Stringham*, 38 Utah 113, 110 Pac. 868 (1910), *aff'd* 239 U.S. 44 (1915), overruled on other grounds by *Great Northern Ry. Co., supra*, 315 U.S. at 279. In that case the Utah Supreme Court held, *inter alia*, based on the Secretary's approval of a profile map of a road constructed in 1873, that the Act did apply to a railroad constructed prior to its passage.

The court of appeals erred in assuming that this Court's affirmance of the Utah court's decision was a ratification of the portion of the holding relating to retroactivity. The appeal to the Supreme Court was taken only by the railroad, no other party appearing,[7] on a wholly different issue. The Utah court had ruled that the railroad had title to a right of way. The railroad claimed title in fee simple by virtue of the Act, but the Utah court had declined to rule on that issue. The railroad appealed to this Court in hopes of prevailing in its contention that it held a fee interest. The

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[7] In Great Northern Ry. Co., supra, the Court in reversing Stringham alluded to the problems that affect a court's decision when only one interest appears. 315 U.S. at 279.

Court, in affirming the decision below, considered only the nature of the railroad's interest, assuming it had one, and did not reconsider whether the lower court had properly found it to have had a right of way under the Act.

It is submitted that the Tenth Circuit's decision is contrary to Congress' intent and that its reliance on *Rio Grande Western* is unavailing.

B. *The Secretary's action in approving the Railroad's profile map and due proofs of organization should be construed in harmony with the intent of the Act.*

A government land grant is to be construed strictly against the grantee except where such a construction negates actions taken in reliance on inducements offered by the grant. *United States v. Denver & Rio Grande Ry. Co., supra,* 150 U.S. at 14. Here there was no action taken by the Railroad in reliance on the Act; its actions were taken before the Act existed. Therefore, the Act and the Secretary's actions under it should be strictly interpreted against the Railroad.

In 1875, the Railroad filed a profile map designating a rail line which was yet to be built and which had a different location than the line for which it now claims a 200-foot right of way under the Act.[8] It also filed "due proofs of organization" which stated that, as

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[8] Inasmuch as the factual dispute on the accuracy of the profile map was held immaterial by the lower courts in granting and affirming the grant of summary judgment to the Railroad, it is appropriate in this petition to resolve that dispute in the light most favorable to Boise Cascade.

of August 17, 1875, it was "fully authorized to proceed with the construction of its road." (App. G) Under these circumstances, a reasonable construction of the Secretary's action of September 28, 1875 accepting the articles and due proofs and approving the profile map is that a right of way was granted on a line yet to be built on the route indicated on the profile map.

It is immaterial whether the Secretary had knowledge of the existing line. First, he would not have understood the Act to apply to a road constructed prior to its passage and therefore would have considered the discrepancy between the profile map and the existing line to be intentional. Second, nothing in the Railroad's 1875 filings indicated that the right of way was sought for a line previously constructed. Third, it was common practice for railroads to make amended filings when a new line or branch line was to be constructed. *Great Northern Ry. Co. v. Steinke*, 261 U.S. 119, 125 (1925).

The construction of the Secretary's action proposed in this petition is in harmony with the intent of the Act and is therefore preferred to that of the court of appeals. *United Telecommunications, Inc. v. Commissioner of Internal Revenue*, 589 F.2d 1383, 1390 (10th Cir. 1978). Furthermore, it would not result in an undeserved windfall to the Railroad—the right of way granted would have been forfeited under 43 U.S.C. §§ 937 and 940 by failure to construct, and it does not require the unwarranted extension of *Jamestown & Northern R. Co. v. Jones, supra*, 177 U.S. 125, which the court of appeals was forced to make.

To find that the dispute regarding the inaccuracy of the profile map was immateral, the court cited *Jamestown* for the proposition that the filing of an inaccurate profile map following construction prior to the Act had no effect on a right of way granted under the Act. The unambiguous language of Section 4 of the Act (43 U.S.C. § 937) is contrary to this proposition and *Jamestown* does not support it.

In *Jamestown* and related cases,[9] the question presented was when the grant attached relative to an intervening claim. In each case, the railroad undertook construction of a line after the Act was passed and filed an accurate profile map within a few months. During the short time between construction and filing, approval or administrative processing of the map, an intervening claim arose. In these circumstances, the Court and Secretary have held that construction after the Act provided fixity of location sufficient to perfect the grant against other claimants.

In *Cary v. Chicago, S.P.M.&O. Ry. Co.*, 3 Land Decisions 428 (1885), conflicting claims arose on indemnity lands which had been selected by the railroad under a special act because of the inaccuracy of a map filed by the railroad pursuant to the act. The Secretary said:

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[9] **Stalker v. Oregon Short Line R. Co., 225 U.S. 142 (1912); Washington & Idaho R. Co. v. Coeur D'Alene Ry. & N. Co., 160 U.S. 77 (1895); Phoenix & Eastern R. Co. v. Arizona Eastern R. Co., 9 Ariz. 434, 84 Pac. 1097 (Ariz. 1906), appeal dismissed 207 U.S. 601 (1907); Dakota Central R. Co. v. Downey, 8 Land Decisions 115 (1889).**

> It therefore behooved the company to see to it in the first instance that such patent discrepance [sic] was either explained or rectified before any adverse claim had intervened, since it is not competent for the company to assert a paramount right in the premises by virtue of their [sic] laches.

3 Land Decisions at 429.

If it is assumed that the Act could be applied to lines constructed prior to 1875, the requirement of Section 4 that an accurate profile map be filed is more critical. One knowing that a line was constructed prior to passage of the Act would have no reason to assume that the Act applied to the line unless a map, which designated the line as one to receive the benefits of the Act, was on file. Although it is submitted that the holding of *Rio Grande Western Ry. Co. v. Stringham, supra,* 38 Utah 113, 110 Pac. 868, is in error on the issue of retroactivity of the Act, at least in that case an accurate profile map was filed by the railroad.

Here, the Railroad filed an inaccurate profile map and for over 100 years has allowed this error to go uncorrected. It has used only a 66-foot right of way and has allowed others to use, purchase and sell, without objection, the 134-foot balance of the right of way it now claims. Even now, the Railroad does not claim that it needs or intends to use the 200-foot right of way for railroad purposes. *United States v. Union Pacific R. Co.,* 353 U.S. 112, 119 (1957); *Great Northern Ry. Co. v. United States, supra,* 315 U.S. at 277. Rather, it apparently intends to profit from the reliance of others on its inaccurate map.

The opinion of the Tenth Circuit should be reversed to prevent the Railroad from receiving an unintended and inequitable windfall.

C. *If the Secretary did intend to grant a right of way in the line constructed in 1873, his action is void.*

In its opinion, the court of appeals implies that the Railroad has a 200-foot right of way by virtue of the Act because the actions of the Secretary are binding and cannot be reviewed in a collateral proceeding even if contrary to the intent of the Act. If the Secretary's intent was to approve a right of way in the road constructed in 1873, the court's conclusion is erroneous.

It is a fundamental principle that actions by an administrator which confer benefits not authorized by law are not binding. *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380, 384 (1947). Rights in land conveyed by administrative action may be cancelled if the administrator has acted in violation of regulations or law. *Gray v. Johnson,* 395 F.2d 533, 537 (10th Cir.), *cert. den.* 392 U.S. 906 (1968). Where the actions of the administrator are plainly *ultra vires,* recognition of their nullity is not an attempted invalidation of them but is simply a recognition that they were ineffectual. *Chicago & North Western Ry. Co. v. Continental Oil Co.,* 253 F.2d 468, 472 (10th Cir. 1958).

The Act did not authorize or contemplate the grant of rights of way to railroad companies for lines constructed prior to March 3, 1875. Any action or attempted action by the Secretary which purported to

grant a right of way to the Railroad on its 1873 line would have been *ultra vires* and void. The Court should reverse the decision of the court of appeals.

2. The Decision Below Has Clouded the Title to Land of Thousands of Private Individuals.

In conjunction with and following the building of the transcontinental railroad in the late 1860's and early 1870's, western railroads began to construct a complete system of rail lines between the more populous regions of the West. Developing mining and agricultural industries spurred competition among the railroads to occupy the most important economic districts.[10] From 1870 to 1880, 40,000 miles of new rail lines were built, much of it in the western territories and states.[11]

Prior to 1870, most of this building was induced by lavish government land grants to the railroads. *Leo Sheep Co. v. United States*, 440 U.S. 668, 673 (1979); *Great Northern Ry. Co. v. United States, supra*, 315 U.S. at 273. However, public opinion rose against these grants and by 1872 the House of Representatives had passed a resolution declaring its disfavor with the subsidies. Cong. Globe, 42d Cong. 2d Sess. 1585 (1872). *See also, Great Northern Ry. Co., supra*, 315 U.S. at 273-74. A variety of special acts were passed granting specific rights of way to individual railroads, some with lesser grants than those provided in

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[10] R. E. Reigel, **The Story of the Western Railroads, 95-110 (1926).**

[11] C. J. Corliss, **American Railroads Their Growth and Development (1945).**

the Act. *E.g.*, Act of June 20, 1874, 18 Stat. 130 [granting a 50-foot right of way on each side of the road to a narrow gauge railroad in California]. Other railroads were built without the inducement of any federal grant. In fact, the Railroad's construction of the line in question here without government subsidy was a matter of pride to residents of Utah Territory.[12]

Undoubtedly, many hundreds of miles of other railroads, in addition to the 73 miles of the Railroad involved in this case, were constructed on the public domain prior to the passage of the Act and would have benefitted from a retroactive application of the Act. Under the court of appeals decision in this case, these railroads, to avail themselves of the benefits of the Act, would have been required only to file articles of incorporation and due proofs of organization with the Secretary. Whether they filed profile maps of the lines already built or profile maps of other lines or no profile maps at all would have been immaterial to their receipt of a right of way under the Act on the lines previously constructed. Moreover, a railroad which received a grant under the Act on a line already constructed could not divest itself of it voluntarily or involuntarily. *Northern Pacific Ry. Co. v. Townsend,* 190 U.S. 267 (1903); *Himonas v. Denver & Rio Grande W. R. Co.*, 179 F.2d 171 (10th Cir. 1949); *Allard Cattle Co. v. Colorado & Southern Ry. Co.*, 516 P.2d 123, *aff'd* 530 P.2d 503 (Colo. 1974).

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[12] R. F. Thorum, **Railroad Development in Utah, 1869-1879, 25, 74 (1936).**

Certainly, some of the railroads constructing roads prior to 1875 made the requisite filings at some time to avail themselves of a right of way for new lines or extensions. Inasmuch as the Act only specifies a time requirement for the filing of a profile map[13] and the filing of a profile map has been declared by the lower court here to be unnecessary for a road constructed prior to 1875, these filings could presumably have occurred at anytime until October 21, 1976, when the Act was repealed with respect to further grants. Pub. L. 94-579, Title VII, § 706(a), 90 Stat. 2793.

Thus, the court of appeals' liberal construction of the Act has resulted in the clouding of titles of thousands of private individuals who have acquired proprietary interests in lands lying within 100 feet of these railroad tracks constructed prior to 1875 on the public domain and upon which the railroads may have never even intended to acquire any right of way. The reliance of these property owners and their predecessors on a fenced or used right of way of lesser dimensions, possibly for in excess of 100 years, has been negated by by the railroads' filings of their articles of incorporation. Ironically, these filings could have been made decades after that reliance commenced and for purposes unrelated to the property, title to which is clouded by the filings.

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[13] Profile maps were required to be filed within 12 months of location of any section of the line. 43 U.S.C. 1937. Here the line was located in the fall of 1873 but no profile map was filed until August or September of 1875. Because of the court's holding that it was unnecessary to file a profile map, the timeliness of the Railroad's filing was not an issue below.

The decision is erroneous and should be reversed to prevent this widespread disruption of property rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY B. MONSON,
Counsel of Record

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Attorneys for Petitioner

December 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1462

Filed July 24, 1980

BOISE CASCADE CORPORATION,
Appellant,

v.

UNION PACIFIC RAILROAD COMPANY; SAN PEDRO, LOS ANGELES AND SALT LAKE RAILROAD COMPANY; and THE UNITED STATES OF AMERICA,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

(D.C. No. C-76-374)

Robert D. Maack (Harry D. Pugsley and Watkiss & Campbell, on the briefs) for Appellant.

J. Clare Williams and Robert L. Klarquist (Anthony C. Liotta, Deputy Assistant Attorney General, Ronald L. Rencher, United States Attorney and Charles E. Biblowit, Attorney, Department of Justice, on the briefs) for Appellees.

Before HOLLOWAY, BREITENSTEIN and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This quiet title dispute presents conflicting claims to a strip of land in Utah claimed by Railroads under a federal right-of-way grant and by a lumber company under mesne conveyances from the State of Utah. The United States is joined because of a possible reversionary interest. The district court granted summary judgment for the defendants. See Boise Cascade Corp. v. Union Pacific R.R.Co., D. Utah, 454 F.Supp. 531. We affirm.

The land is in Section 16, T. 6 South, R. 2 East, Utah County, Utah. Plaintiff-appellant Boise Cascade is the successor in interest of the grantee of a patent by Utah, which claimed ownership of Section 16 as a school section to which it had received title under the Fundamental Enabling Act of July 16, 1894, 28 Stat. 107.

In 1873 Southern Railroad Company constructed a railroad line across part of Section 16. By a series of conveyances defendant-appellee San Pedro, Los Angeles & Salt Lake Railroad Company obtained ownership of the line and later leased it to the defendant-appellee Union Pacific R. Co. The Railroads claim title under the General Right of Way Act of March 3 1875, 18 Stat. 482, 43 U.S.C. § 934. They say that they are entitled to a strip 100 feet on each side of the track. The Railroads put up a fence 33 feet on each side of the track center line. The dispute is over a strip between the fence and 67 feet westerly from it. Boise Cascade built a lumber yard and made other improvements within the 67 foot strip.

The 1875 Right of Way Act provides, 43 U.S.C. § 934:

> "The right of way through the public lands of the United States is granted to any railroad company * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road."

It is undisputed that the constructing Railroad filed its articles of incorporation and proofs of organization in 1875 and that construction of the tracks was completed in 1873.

The 1875 Act also provides, 43 U.S.C. § 937, that a railroad desiring to take advantage of § 934 shall within a specified time file in the appropriate land office "a profile of its road." Boise Cascade claims that the Railroad in 1875 filed a profile map which shows a center line about 400 feet easterly of the center line of the constructed track. Boise Cascade argues that the profile map controls and the Railroads have only an easement over the land covered by the track with 33 feet on each side as enclosed by the fence.

The Railroads deny the Boise Cascade claim that the profile map designates a center line other than the actual track. This factual dispute does not prevent a summary judgment if, as a matter of law, the Railroads prevail. The district court held that actual construction of the track plus the filing of the specified documents perfected the Railroads' right of way to the extent of 100 feet on each side of the center line of the track.

In Jamestown and Northern R. Co. v. Jones, 177 U.S. 125, 130, the Supreme Court rejected a state court's conclusion that the "right of way only became definitely located by the filing of a profile map," and adopted the Interior Department's rulings that "the right of way may be definitely located by the actual construction of the road." The Court said, Id. at 131:

> "The ruling gives a practical operation to the statute, and we think is correct. It enables the railroad company to secure the grant by an actual construction of its road, or in advance of construction by filing a map as provided in section four. Actual construction is certainly unmistakable evidence and notice of appropriation"

See also Minneapolis, St. Paul &c Ry. Co. v. Doughty, 208 U.S. 251, 258-259; Noble v. Oklahoma City, 297 U.S. 481, 494; and United States v. Southern Pacific Trans. Co., 9 Cir., 543 F.2d 676, 697.

Boise Cascade seeks to distinguish Jamestown by the claim that the General Right of Way Act of 1875 operates prospectively and applies only to actual construction after the passage of the Act. In Jamestown the raiload was constructed in 1882, after the Act. In the instant case the construction was in 1873, before the Act. The difference is unimportant. Actual construction is notice of location whether it occurs before or after the Act. By accepting the articles of incorporation, the proofs of organization, and the profile map after the passage of the Act, the Secretary of Interior necessarily determined that the Act applied. Rio Grande Western Ry. Co. v. Stringham, Utah, 110 Pac. 868,

871, affirmed 239 U.S. 44, reversed on another ground by Great Northern Ry. Co. v. United States, 315 U.S. 262, 279. The actions of the Secretary may not be reviewed in this collateral proceeding. We are convinced that the 1875 Act applies to determine the rights of the parties.

Boise Cascade also says that Jamestown applies only to unsurveyed lands, and Section 16, involved here, was surveyed when the Railroads' right of way is claimed to have attached. In Jamestown the Court noted that the Interior Department decisions dealt with surveyed land and "the only difference which the act of Congress makes between surveyed and unsurveyed land is the provision in section four for filing the profile of the road." 177 U.S. at 132.

Boise Cascade relies on several state court decisions. Two of these, Chicago K. & N. Ry. Co. v. Van Cleave, Kan., 33 Pac. 472, and Kinion v. Kansas City, Ft. S.&M.R. Co., Mo., 24 S.W. 636, were decided before Jamestown. Minneapolis, St. Paul &c Ry. Co., supra, 208 U.S. at 258, noted the split among lower courts before Jamestown. Phoenix & E. R. Co. v. Arizona Eastern R. Co., Ariz., 84 Pac. 1097, 1099, appeal dismissed, 207 U.S. 601, supports the Railroads as it recognizes that rights may be acquired by actual construction even though the construction is over land not included in the right of way portrayed in the filed profile.

The next issue is whether the claim of the Railroads is defeated by the Utah patent through which Cascade

claims. The Utah title is derived from the Fundamental Enabling Act of July 16, 1894, 28 Stat. 107, which granted Section 16 in each township to Utah for support of the public schools. The difficulty is that the Enabling Act provides, § 13, 28 Stat. 110, that the lands granted to the State "shall be selected under the direction of the Secretary of the Interior from the unappropriated public lands of the United States within the limits of said State of Utah." The disputed land was appropriated by the Railroads under the 1875 General Right of Way Act.

Wyoming v. Udall, 10 Cir., 379 F.2d 635, 640, cert. denied 389 U.S. 985, in discussing the Wyoming Enabling Act, said:

> "* * * the congressional intent was that if part of any section to be granted for school purposes had been disposed of under an act of Congress, the state on admission did not get that part of the section."

Boise Cascade seeks to limit the precedential value of the Wyoming case on the ground that it applied only to pre-1871 grants. That distinction applies to another aspect of the decision and does not affect its discussion of grants of school sections.

Boise Cascade next claims by reason of adverse possession, abandonment, estoppel, and boundary by acquiescence. It emphasizes that the Railroads have not fenced the entire 100 feet claimed on each side of the center line and have been aware of the occupation by

Boise Cascade. A factual dispute concerns the payment of taxes. These claims are all irrelevant. In Northern Pacific Ry. Co. v. Townsend, 190 U.S. 267, 271-272, the Court noted that in granting the right of way Congress conclusively determined the strip covered was necessary for an important public work and said:

> "The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes."

See also Northern Pacific Railroad Co. v. Smith, 171 U.S. 260, 275, and Himonas v. Denver & R.G.W.R. Co., 10 Cir., 179 F.2d 171, 173. The question of abandonment of the land covered by the profile map, see 43 U. . C. § 937, is of no concern as Boise Cascade claims no right to that land.

Boise Cascade also asserts rights under various state statutes. It claims to be a bona fide purchaser under § 57-3-2, Utah Code Anno., to be protected by the Occupying Claimants Act, § 57-6-1 et seq., and to have superior title under the Marketable Record Title Act, § 57-9-1 et seq. Section 57-9-6 of the latter Act says that it does not apply to extinguish a railroad easement. It is enough to say that state law cannot operate to "impair the efficacy" of a federal grant or vest title in someone other than the federal grantee. See Packer v. Bird, 137 U.S. 661, 669; Shively v. Bowlby, 152 U.S. 1, 44; and Northern Pacific Ry. Co. v. Townsend, 190 U.S. 267, 270.

The United States, which was joined as a party because of a possible reversionary interest, moved to dismiss on jurisdictional grounds. Because of its grant of summary judgment for the defendants, the district court did not consider the jurisdictional issue. In this court the United States asks that the district court judgment be affirmed but claims that the action against the United States is barred by the Quiet Title Act, 28 U.S.C. § 2409a. See Amoco Production Co. v. United States, 10 Cir., ...F.2d..... (No. 78-1147, decided April 21, 1980). In the circumstances presented, resolution of the point is unnecessary.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

C 76-374

Filed March 24, 1978

BOISE CASCADE CORPORATION, a corporation,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation; THE SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation; and UNITED STATES OF AMERICA,

Defendants.

This matter is presently before the court on the motions for summary judgment of the plaintiff and of the defendant raiload companies, and the motion to dismiss of the defendant United States. Inasmuch as the motion to dismiss of defendant United States is based in part upon Rule 12(b)(6), *Federal Rules of Civil Procedure,* and matters outside of the pleadings have been presented to and not excluded by the court, the motion to dismiss shall be treated as one for summary judgment pursuant to Rule 12(b), *Federal Rules of Civil Procedure,* and disposed of in accordance with

Rule 56, *Federal Rules of Civil Procedure*. The matters presented by the motions have been thoroughly briefed by the parties, the matters were argued orally before the court on December 27, 1977, and the parties filed a stipulation of facts on January 3, 1978. Having fully and carefully considered the matters presented by the motions and concluding that there is no genuine issue as to any material fact, the court is prepared to enter its ruling.

Essentially, the present controversy is a property dispute concerning a certain strip of property located in Utah County. According to the stipulation of facts, "[t]he defendant railroads claim title to an easement for railroad purposes across the property extending 100 feet on each side of the center line of its trackage, based upon the General Right-of-Way Act of Congress March 3, 1875." Stipulation of Facts ¶ 4 (hereinafter "Stipulation"). The property in dispute is one side of the trackage only, that side being the west side. Rather than fencing the property to include the entire claimed 100 feet on each side of the trackage, the defendant railroads have, "for more than 20 years," fenced in only 33 feet on each side of the trackage. The remaining 67 feet of the 100 feet on one side of the trackage claimed by defendants is also claimed (and fenced) by plaintiff and, thus, it is this property area that is in dispute in this litigation. Stipulation ¶ 7.

As fully set forth in the stipulation of facts, plaintiff has a record chain of title to the real property in question based upon a patent issued by the State of

Utah to plaintiff's predecessor in interest. Stipulation ¶ 1. "The State of Utah's rights, if any, in and to the subject property, are based upon the Enabling Act which granted Utah Statehood and purported to convey to the State of Utah as a 'school section' all of Section 16 of Township 6 South, Range 2 East. The Enabling Act does not make any specific exception for the railroad right-of-way claimed by the defendant railroads, but does state that all lands granted the State under the Act are to be selected from the *unappropriated* public lands of the United States." Stipulation ¶ 3 (emphasis added).

The respective positions of the parties may be briefly stated as follows. It is the contention of defendants that defendant railroads, or their predecessor in interest, complied fully with the General Right-of-Way Act of 1875 and thus obtained from Congress the 200 foot right-of-way across the west half of Section 16, which includes within its westerly boundary the property in question. Under the law, defendants argue, this right-of-way obtained from Congress is not subject to defeasance by any theory of state law or any type of equitable consideration. Defendant Railroads' *Reply Memorandum* at 10. Plaintiff, on the other hand, claims that defendant railroads, or their predecessor in interest, did not comply fully with the General Right-of-Way Act of 1875 in that said parties filed an erroneous profile map with the Secretary of Interior and that, as a result thereof, defendant railroads have only "a possessory adverse right to the area" presently occupied by them. *Memorandum in Support of Plaintiff's Motion for Sum-*

mary Judgment and Opposition to Defendants' Motions at 4. Plaintiff further claims that it is the fee title owner of the property in dispute by virtue of one or more of the following statutes and doctrines: that it is a bona fide purchaser for value of the realty; that plaintiff has adversely possessed the property for the required time; that defendants have abandoned the right-of-way; that plaintiff has obtained the property by the doctrine of boundary by acquiescence; that plaintiff has a sure root of title from the State of Utah as described earlier; that the Utah Marketable Title Act (*Utah Code Ann.* §§ 57-9-1 to 9) constitutes a bar to defendants' claim to the property; and that plaintiff is a bona fide occupying claimant entitled to the benefits of *Utah Code Ann.* §§ 57-6-1 et seq. *Memorandum in Support of Plaintiff's Motion for Summary Judgment and Opposition to Defendants' Motions* at 1-2.

It is the opinion of the court that the defendant railroads, or their predecessor in interest, complied fully with the General Right-of-Way Act of 1875 and thereby acquired an easement for railroad purposes that was not affected by the patent granted by the State of Utah to plaintiff's predecessor in interest, and that has not been and cannot be subject to defeasance by the common law and state property doctrines and provisions relied upon by the plaintiff. On the basis of 43 U.S.C. § 934 and *Jamestown & N.R. Co. v. Jones,* 177 U.S. 125 (1900), the court concludes that defendant railroads have a right-of-way that was perfected in the following manner: first, the filing of defendant railroads' predecessor in interest, Utah Southern Railroad Company,

with the Department of Interior its articles of incorporation and due proofs of organization by no later than September, 1875 (Stipulation § 6); and, second, the construction of the railroads' trackage in 1873 (Stipulation ¶ 5). The above filings together with the previous actual construction of the trackage was all that was necessary to comply fully with the 1875 Act. As defendants correctly contend, the filing of the profile map pursuant to 42 U.S.C. § 937 and upon which plaintiff hinges its non-compliance argument is required and relevant only in connection with those situations in which the trackage is not already actually constructed at the time of the other required filings. *Jamestown, supra,* at 130-31.

Since the grant of the right-of-way under § 934 was secured by the actual construction of the trackage and the filing of the articles of incorporation and due proofs of organization, the only remaining question is whether the claim of the railroads based upon the Congressional grant to the railroads is inferior to the claim of plaintiff by virtue of the doctrines cited by plaintiff. First, the court concludes that the right-of-way granted by Congress cannot be diminished by conveyance, or by the doctrines of adverse possession, abandonment or boundary by acquiescence. *See, e.g., Northern Pac. Ry. v. Townsend,* 190 U.S. 267 (1903); *Himonas v. Denver & R.G.W.R. Co.,* 179 F.2d 171 (10th Cir. 1949); *Allard Cattle Co. v. Colorado & So. Ry. Co.,* 516 P.2d 123 (Colo. 1973), *aff'd.* 530 P.2d 503 (Colo. 1974). The reasoning of these cases is that the Congressional intent as to this result is plainly manifest and

that, under the grant, railroads are legally incapable of alienating the subject property in any way, directly or indirectly. The court concurs in this rationale.

Second, as defendant railroads set forth at pages 10 to 15 of their *Memorandum in Support of Motion for Summary Judgment*, plaintiff has not acquired and cannot acquire any rights to the property in question under its claimed patent pursuant to the Fundamental Enabling Act of July 16, 1894. This Act expressly provides that all lands granted the State under the Act are to be selected from the *unappropriated* public lands of the United States. Stipulation ¶ 3. And, as indicated above, the land in question was appropriated to the railroads pursuant to the General Right-of-Way Act of 1875.

Third, plaintiff's claimed reliance upon the Utah Marketable Title Act is misplaced. Dispositive of the present contention of plaintiff is § 57-9-6, *Utah Code Ann.*, which specifically excepts application of the Act by stating in pertinent part:

> This act shall not be applied . . . to bar or extinguish any easement or interest in the nature of an easement created or held for any . . . railroad or public utility purpose, or any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use. . . .

Finally, the aid sought by plaintiff in Utah's Occupying Claimants Act is of no avail in the present action. Even assuming the applicability of the statute,

that this statute has no bearing upon this action is apparent in view of the doctrine enunciated in several opinions of the United Staes Supreme Court that:

> The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the state, *subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.*

Packer v. Bird, 137 U.S. 661, 669 (1891) (emphasis added). Also, see *Northern Pac. Ry. v. Townsend, supra,* at 270, and *Shively v. Bowlby,* 152 U.S. 1,44 (1894).

For the reasons stated, the court concludes that the claim of defendant railroads is superior to that of plaintiff. Wherefore,

IT IS HEREBY ORDERED that the motion for summary judgment of plaintiff is denied and the motions for summary judgment of defendants are granted.

The court has not considered the additional grounds urged by defendant United States in support of their motion to dismiss based upon the provisions of 28 U.S.C. §§ 2409a(f) and (g). See *Memorandum Brief in Support of Motion to Dismiss,* filed October 17, 1977, at 3-5.

DATED this 22nd day of March 1978.

ALDON J. ANDERSON
United States District Judge

APPENDIX C

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SUMMARY JUDGMENT AND
DECREE QUIETING TITLE

Civil No. C 76-374

Filed May 2, 1978

BOISE CASCADE CORPORATION, a corporation,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation; THE SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation; and UNITED STATES OF AMERICA,

Defendants.

Plaintiff in the above-entitled action made a motion for summary judgment and defendants made a cross-motion for a summary judgment dismissing plaintiff's complaint and granting the prayer of defendant railroads' counterclaim and said motion and cross-motion duly came on to be heard by the Court on Decem-

ber 27, 1977. On considering all the proceedings had herein, and the pleadings and other documents on file herein, including the complaint, answers and counterclaim, memorandums of law with accompanying affidavits and exhibits, and stipulation of facts; and Brent D. Ward, Esq., having appeared for the defendant United States of America, and J. Clare Williams, Esq., having appeared for the defendant railroads, and Harry D. Pugsley, Esq., having appeared for the plaintiff, and the Court being fully advised in the premises, and due deliberation having been had thereon, and the Court having issued and filed its opinion, decision and order containing its findings of fact and conclusions of law:

NOW, IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. That plaintiff's motion for summary judgment be, and it hereby is denied.

2. That plaintiff's complaint hereby be, and it hereby is, dismissed on the merits.

3. That defendants' cross-motion for summary judgment be, and the same is granted.

4. That the prayer of defendant railroads' counterclaim be, and it hereby is granted and in regard thereto, it is hereby further ORDERED, ADJUDGED and DECREED that:

(1) The plaintiff has no estate or interest whatsoever in or to that certain 200 foot right of way easement

for railroad purposes, to the extent of 100 feet on each side of defendants' tracks, granted the Utah Southern Railroad Company pursuant to the General Right of Way Act of Congress of March 3, 1875 (18 Stat. 482, 43 U.S.C.A. § 934), as said right of way easement traverses the W. ½ of Section 16, T. 6 S., R. 2 E., SLB&M, or in the real property hereinafter described lying within the boundaries of said right of way which estate or interest is or may be inconsistent with the estate and interest held by defendant railroad companies pursuant to said Right of Way Act of March 3, 1875.

(2) The San Pedro, Los Angeles and Salt Lake Railroad Company and Union Pacific Railroad Company, subject to any interest retained by the United States, are owner and lessee, respectively, of a 200 foot wide right of way easement for railroad purposes, to the extent of 100 feet on each side of their tracks, obtained by Congressional grant pursuant to the General Right of Way Act of March 3, 1875 (18 Stat. 482, 43 U.S.C.A. § 934), are entitled to exclusive and perpetual use and enjoyment of the real property, hereinafter described, for as long as it is used for railroad-connected purposes, are in possession thereof, and are entitled to such possession thereof, and that such title of said railroad companies in and to said right of way property be and the same hereby is quieted against all claims and demands of plaintiff and that said plaintiff is hereby forever barred from asserting any claim whatsoever in and to said right of way property or any part thereof adverse to the estate and interest of defendant railroad companies.

The property in question is situated in Utah County, State of Utah, being that portion of the W. ½ of Section 16, T. 6 S., R. 2 E., SLB&M, more particularly described as follows:

> Commencing at a point 326 feet East and 49 feet South of the Northwest corner of the Southwest quarter of Section 16, Township 6 South, Range 2 East, Salt Lake Base and Meridian; said point being in the Southerly boundary line of Orem City Center Street; thence South 101 feet; thence West 96 feet; thence South 50 feet; thence West 200 feet to the Easterly boundary line of Utah State Highway 114 right-of-way; thence along said highway right-of-way boundary line South 0°06′ East 925.58 feet; thence East 531.30 feet, more or less, to the Westerly boundary line of the Los Angeles and Salt Lake Railroad right-of-way; thence along said railroad right-of-way line North 7°15′ West 1082.53 feet, more or less, to the Southerly boundary line of Orem City Center Street right-of-way; thence along said street right-of-way boundary line West 106.89 feet to the point of beginning.

DATED this 2nd day of May, 1978.

BY THE COURT:

ALDON J. ANDERSON,
Chief Judge
United States District Court

APPENDIX D

SEPTEMBER TERM — September 22, 1980

Before Honorable William J. Holloway, Jr., Honorable Jean S. Breitenstein and Honorable William E. Doyle, Circuit Judges.

No. 78-1462

BOISE CASCADE CORPORATION, a corporation,

Plaintiff-Appellant

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation; THE SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation; and UNITED STATES OF AMERICA,

Defendants-Appellees.

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS

Clerk

APPENDIX E

SEPTEMBER TERM — September 23, 1980
Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Williams E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges

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No. 78-1462

BOISE CASCADE CORPORATION, a corporation,

Plaintiff-Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation; THE SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation; and UNITED STATES OF AMERICA,

Defendants-Appellees.

This matter comes on for consideration of appellant's suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS,
Clerk

APPENDIX F

§ 934. *Right-of-way through public lands granted to railroads*

The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road. Mar. 3, 1875, c. 152, § 1, 18 Stat. 482.

§ 935. Several roads through canyons

Any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway located therein on March 3, 1875, nor prevent the

location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided,* That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass or defile. Mar. 3, 1875, c. 152, § 2, 18 Stat. 482.

§ 936. *Condemnation of private land*

The legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled "An Act to amend an Act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July 1, 1862,'" approved July 2, 1864. Mar. 3, 1875, c. 152, § 3, 18 Stat. 482.

§ 937. *Filing profile of road; forfeiture of rights*

Any railroad company desiring to secure the benefits of sections 934-939 of this title shall, within twelve

months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road. Mar. 3, 1875, c. 152, § 4, 18 Stat. 483; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.

§ 938. *Lands excepted*

Sections 934-939 of this title shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by Act of Congress passed prior to March 3, 1875. Mar. 3, 1875, c. 152, § 5, 18 Stat. 483.

§ 939. Alteration, amendment, or repeal

Congress hereby reserves the right at any time to alter, amend, or repeal sections 934-939 of this title, or any part thereof. Mar. 3, 1875, c. 152, § 6, 18 Stat. 483.

§ 940. *Forfeiture of rights where railroad not constructed in five years after location*

Each and every grant of right of way and station grounds made prior to February 25, 1909, to any railroad corporation under sections 934-939 of this title where such railroad had not been constructed and the period of five years next following the location of said road, or any section thereof, had on that date expired, is declared forfeited to the United States, to the extent of any portion of such located line then remaining unconstructed, and the United States resumes the full title to the lands covered thereby free and discharged from such easement, and the forfeiture declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land conveyed by the United States prior to such date subject to any such grant of right of way or station grounds: *Provided,* That no right of way on which construction was progressing in good faith on February 25, 1909, shall be in any wise affected, validated, or invalidated, by the provisions of this section. Feb. 25, 1909, c. 191, 35 Stat. 647.

28 Statutes at Large 107, Fifty-Third Congress, 1894.

CHAP. 138—An Act To enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the original States. July 16, 1894.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the

area of the United States now constituting the Territory of Utah, as at present described, may become the State of Utah, as hereinafter provided.

. . . .

SEC. 6. That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as continguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such in demnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

. . . .

SEC. 13. That all land granted in quantity or as indemnity by this Act shall be selected under the direction of the Secretary of the Interior, from the unappropriated public lands of the United States within the limits of said State of Utah.

. . . .

APPENDIX G

Territory of Utah }
Salt Lake County } ss

I, William Clayton, Auditor of Public Accounts of Utah Territory, do hereby certify and state, that the organization of the "Utah Southern Railroad Company", a corporation created under and by virtue of the laws of the said Territory, has been completed; that the said Railroad Company is fully authorized to proceed with the construction of its road according to the existing laws of the said Territory; and that the copy of the Articles of Association to which this statement is attached, is a full, true, and correct copy of the original "Articles of Association" of the said Company, now on file in my office, where the same are by law required to be kept.

Witness my hand and official seal, at my office in Salt Lake City, Utah Territory, this seventeenth day of August A.D. 1875.

/s/ Wm Clayton
Auditor of Public Accounts
for Utah Territory

SEAL